No. 96-691

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

YOUNIS BROS. AND CO., INC.,

Petitioner,

vs.

CIGNA WORLDWIDE INSURANCE COMPANY,

Respondent,

-and-

THE ABI JAOUDI and AZAR TRADING CORPORATION,

Petitioner,

vs.

CIGNA WORLDWIDE INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether the Court should grant certiorari on a petition containing only unreviewable state law claims, routine hearsay evidentiary issues, and moot jury questions.

DISCLOSURE OF CORPORATE AFFILIATIONS

CIGNA Worldwide Insurance Company is a subsidiary of CIGNA Corporation, which indirectly owns 100 percent of the shares in CIGNA Worldwide Insurance Company. A Philippine corporation, P.C.I.B. CIGNA Life Insurance Company, is a nonwholly owned subsidiary of CIGNA Worldwide Insurance Company.

TABLE OF CONTENTS

	Page
Counter Statement of Question Presented	i
Disclosure of Corporate Affiliations	ii
Table of Contents	iii
Table of Citations	iv
Statement of Jurisdiction	1
Counter Statement of the Case	1
Reasons for Denying the Writ	6
I. The Court lacks jurisdiction over the petitioners' state law claims.	6
II. Certiorari should not be granted to review trial hearsay rulings raising no important federal question.	8
III. Certiorari should not be granted to render what would amount to advisory opinions on claims that are moot.	10
Conclusion	12

Page

TABLE OF CITATIONS

Cases Cited:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 10

Brady v. Southern Railroad Co., 320 U.S. 476 (1943) 10

Ellis v. Dixon, 349 U.S. 458 (1955) 7

Fay v. Noia, 372 U.S. 391 (1963) 6, 10, 11

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) .. 11

Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949) .. 11

Mano Insurance Company v. Picasso Cafeteria, March Term, A.D. 1995 (Liberia July 28, 1995) 4, 5, 7

Mano Insurance Company v. Picasso Cafeteria, March Term, A.D. 1996 (Liberia September 27, 1996) 6, 7

McKay v. Foster, 332 U.S. 783 (1947) 7

Montana v. Imlay, 506 U.S. __, 113 S. Ct. 444, 121 L. Ed. 2d 310 (1992) 10

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 8, 9

Contents

	Page
Somportex Limited v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972)	7
Stembridge v. Georgia, 343 U.S. 541 (1952)	7
Tannenbaum v. Connecticut Fire Insurance Co., 127 Pa. Super. 278, 193 A. 305 (1937)	5
United States v. Richardson, 418 U.S. 166 (1974)	10
Statutes Cited:	
28 U.S.C. § 1254(1)	1
42 Pa. C.S.A. § 8371	2
Rules Cited:	
Supreme Court Rule 10	8
Federal Rule of Evidence 803(3)	9

Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit. The Third Circuit's opinion is reported at 91 F.3d 13 (3d Cir. 1996). The district court opinion affirmed by the Third Circuit is reported at 899 F. Supp. 1385 (E.D. Pa. 1995).

STATEMENT OF JURISDICTION

Petitioners seek to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). Jurisdiction over the petitioners' state law claims is disputed; the remaining claims are not appropriate for granting certiorari.

COUNTER STATEMENT OF THE CASE

This petition involves a suit by two Liberian businesses against their insurer, respondent CIGNA Worldwide Insurance Company ("CWW"). The petitioners filed insurance claims for looting and/or fire damage they claimed occurred at seven different locations in Harbel and Monrovia, Liberia, over a span of six months from June through November, 1990, during the height of a civil war. According to the petitioners, these losses resulted from purely local rioting, and, for that reason, were covered by their CWW policies.

CWW denied the claims. It proved at trial that petitioners' losses were caused, not by local rioting, but by an insurrection that started in December, 1989, and developed into a full scale Civil War that raged throughout 1990, and beyond. Fierce battles were fought in Harbel in June, 1990, and in Monrovia, from July through November, of 1990, the time period covering the petitioners' losses. CWW argued that the petitioners' losses were

excluded from coverage under the War Risk Exclusion Clauses contained in each of the petitioners' policies.[1]

The petitioners filed suit in the United States District Court for the Eastern District of Pennsylvania. In addition to coverage claims, petitioners contended that CWW acted in bad faith by denying their insurance claims, and that it unreasonably delayed investigating their claims. CWW answered that it was not bad faith to deny uncovered claims, and that it sent investigators to Liberia as early as war conditions would permit safe passage.

The parties disagreed initially on what law governed the case. CWW argued Liberian law applied; the petitioners argued for Pennsylvania law, including Pennsylvania's bad faith statute, 42 Pa. C.S.A. § 8371. The district court ruled that Pennsylvania law applied. Neither side contested the district court's choice of law decision on appeal.

At trial, CWW presented extensive evidence to document the inception and progress of the Liberian Civil War. The uncontroverted evidence showed that identifiable rebel groups, headed by Charles Taylor, invaded Liberia's interior border on

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1. The War Risk Exclusion Clauses in the petitioner's Fire Policies excluded losses caused "directly or indirectly" by "(c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power." The Extended Coverage Endorsements to the petitioners' Fire Policies covered looting losses caused "directly" by riot, but *excluded* looting loss "caused directly or indirectly" by "insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence." A Burglary Policy and a Money and Securities Policy CWW issued to petitioner Abi Jaoudi and Azar Trading Corporation ("AJA") excluded coverage for "loss due to war, whether or not declared, civil war, insurrection, rebellion, revolution or to any act or condition incident to any of the foregoing." Additionally, AJA's Accounts Receivable Policy excluded coverage for losses "caused by or resulting from" the same types of occurrences.

December 24, 1989, and that Taylor's group, with a later splinter group, headed by Prince Ormie Johnson, fought their way through Liberia to the country's capital city of Monrovia, on the coast. Uncontradicted evidence established that the rebel leaders' expressed goal was to overthrow the Liberian government, headed by President Samuel Doe, and to assume control of the government.[2]

Through the testimony of uncommonly reliable and disinterested witnesses, CWW documented the chaotic living conditions that attended the rebel fighting in Harbel and Monrovia, including looting, lawlessness, fires, and a complete breakdown of law enforcement and civil authority in Harbel and Monrovia. These witnesses included international journalists from the Associated Press, British Broadcasting Corporation, the London Manchester Guardian, some of whom had direct interviews and conversations with the rebel leaders, a Defense Department and Army Attache to the American Embassy, a Cabinet Minister and other officials from the Liberian government, such as the Liberian Court Administrator, the Deputy Coordinator for Operations at the Freeport of Monrovia, and officials from the tax and insurance departments. CWW also presented the testimony of residents who lived through the crisis, including a conscripted rebel soldier and Government soldiers who participated in looting.

Residents endured lack of food or water. Hordes of starving refugees fled to Monrovia from battles elsewhere in the country, and, with other starving residents, took to looting for food and other necessities of life amidst a climate where there were no police to control the turmoil, firefighters to put out fires, or even protection from Government troops, which either participated in the looting or were preoccupied with fighting the rebels. The petitioners' own employees, on cross-examination by CWW,

2. The evidence showed that, after reaching Monrovia, Prince Johnson and his followers abducted and killed President Doe.

described fighting in the streets of Harbel and Monrovia, and the severe deprivation, lawlessness and absence of civil authority caused by that fighting.

The jury, surprisingly, returned a verdict for the petitioners on the coverage and bad faith claims. Since the petitioners had demanded a jury trial, and since Pennsylvania's bad faith statute provides that, upon a finding of bad faith, "the court may" award punitive damages, interest, attorneys' fees or costs, the district court bifurcated trial of the bad faith damages. Under this bifurcation plan, the jury decided the issue of punitive damages and the district court decided whether any other bad faith damages would be awarded. The jury assessed no punitive damages against CWW, finding that CWW's conduct was not outrageous. The district court then ruled that the evidence did not support the award of interest, attorneys fees or costs.

Thereafter, the district court granted judgment notwithstanding the verdict on two grounds: (a) that the trial evidence proved CWW's War Risk Defense as a matter of law, and (b) that "no evidence" supported the bad faith verdict.[3]

While post-verdict motions were pending, the Liberian Supreme Court decided a separate case involving an insurance claim for looting damages in Monrovia in June, 1990, *Mano Insurance Company v. Picasso Cafeteria.* The Liberian high court held in *Mano* that the Civil War was the efficient, proximate cause of the looting losses, and under the provisions of the policy there at issue, that the insurance claim was not covered by the plaintiff's insurance policy.

While not challenging the district court's previous choice

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3. The district court also granted alternative relief in the form of a new trial on the grounds that: (a) the jury's verdict was against the weight of the evidence, and (b) the district court had committed reversible error by giving the ambiguity jury instruction the petitioners had requested.

of law decision, CWW suggested that the district court review the *Mano* case under comity principles, both for the Liberian high court's acknowledgement that a Civil War, and not local rioting, had occurred in Monrovia, and for the use in the Liberian decision of the same test for causation that was applicable under Pennsylvania law.

The petitioners heatedly protested this idea, calling the comity doctrine "inapplicable" and the *Mano* decision "without legal effect." Neither the district court nor the Third Circuit based their decisions on Liberian law.[4]

Using applicable United States law, the Third Circuit affirmed the district court. In particular, the Third Circuit reviewed and affirmed the district court's ruling that the Liberian Civil War was the efficient, proximate cause of the petitioners' losses. The proximate cause test used by the Third Circuit was the same test of causation approved by the Pennsylvania courts for insurance matters. *Tannenbaum v. Connecticut Fire Insurance Co.*, 127 Pa. Super. 278, 284, 193 A. 305 (1937) (approving use of proximate cause test in insurance cases).

After the Third Circuit's opinion was filed, the Liberian Supreme Court reversed its decision in *Mano*.[5] In so ruling, the Liberian high court ruled that only war risk damages caused by the direct effect of offensive or defensive military operations were excluded from coverage under War Risk Exclusion Clauses.

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4. The district court, however, stated that it would have reached the same decision had it decided the case on Liberian law. The court of appeals did not even consider the Liberian *Mano* decision.

5. The strange way in which a reconstituted, restructured court found a basis for a third review is troublesome and ought give one pause as to the validity of the opinion.

Abandoning their prior positions and arguments, and rejecting the lower courts' apparent reliance on their arguments, the petitioners now opportunistically, and overexpansively, contend that this particular decision by the Liberian Supreme Court "fixes the standard" for the test of causation in insurance cases, that "courts in [the United States] should apply that standard as well," and that the Third Circuit should be reversed for not following the second *Mano* decision, decided after the Third Circuit ruled, under principles of comity. Petition for Writ Certiorari, at 17.

REASONS FOR DENYING THE WRIT

The petition presents the Court with an array of unreviewable state law claims, routine trial evidentiary rulings, and moot Seventh Amendment questions. The petition is not deserving of review and should be denied. This Court does not grant certiorari to hear state law claims, for jurisdictional reasons. Moreover, the claims that do contain federal questions do not remotely approach the level of importance or public interest justifying certiorari, nor are they supported by any other of the "special" reasons discussed in Supreme Court Rule 10 that might warrant this Court's review.

I.

THE COURT LACKS JURISDICTION OVER THE PETITIONERS' STATE LAW CLAIMS.

This Court has repeatedly declined to review judgments resting on independent state grounds, for jurisdictional reasons. As the Court stated in *Fay v. Noia*, 372 U.S. 391, 428 (1963), it does not have the "power" to reverse decisions that are based on adequate and independent state grounds and that do not present questions of the validity or construction of the "federal

constitution, treaties, statutes, commissions or authorities in dispute." *Accord Ellis v. Dixon*, 349 U.S. 458 (1955); *Stembridge v. Georgia*, 343 U.S. 541 (1952); *McKay v. Foster*, 332 U.S. 783 (1947) (all denying certiorari because the decision below rested on nonfederal grounds). No such federal questions are raised in Sections III and VI of the petition.

Section III of the petition claims: (a) that the Third Circuit "used the wrong standard of causation," and (b) that the Third Circuit should be reversed for not according comity to the second, though not the first, *Mano* decision. The definition, scope and application of the test of causation, however, is purely a matter of state law, unless some federal right were offended by the test applied. Petitioners identify no constitutional provision or other federal right allegedly violated by the lower courts' analysis of causation, and this is fatal to their petition. The claim raised in the petition does not rise above a state law claim.

Petitioners' comity claim also raises no federal question. Since this case does not involve a suit by or against foreign governments, it does not implicate treaties with foreign countries, federal jurisdiction over foreign governments or other, similar federal issues. The question raised in the petition is simply whether the Third Circuit should have accorded comity to a judicial opinion of a foreign country. Such a claim is manifestly a state law question. *Somportex Limited v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972) (a federal court in diversity applies the comity principles of the state where the federal court is sitting, in this case, Pennsylvania). The petitioners allege no constitutional or federal right otherwise implicated in the comity claim. Accordingly, review of this claim should not be granted.

Section VI of the petition also raises only a state law claim. This section of the petition alleges the substantively incorrect

claim, which is contrary to numerous state and federal cases interpreting the state statute, that the district court's interpretation of the term "may" in Pennsylvania's bad faith statute was contrary to the state legislature's intent in enacting the statute. While the heading to Section VI alleges that the lower courts' interpretation of Pennsylvania's bad faith statute was "unconstitutional," the body of the argument makes it clear that, if there is a claim of unconstitutionality being discussed, it is at most a violation of the state constitution (which this Court does not review) and not a violation of the federal constitution (which this Court might choose to review). As with the causation and comity claims, Section VI identifies no federal constitutional provision, federal statute, or other federal standard, purportedly at issue.

Accordingly, review of these claims should be denied because they raise no federal question.

II.

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW TRIAL HEARSAY RULINGS RAISING NO IMPORTANT FEDERAL QUESTION.

Even where federal questions are raised in a petition, Supreme Court Rule 10 makes it clear that the Court will not grant certiorari unless there are "special and important reasons" for review. As the Court stated in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955):

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in

> such issues. Nor does it sit for the benefit of the particular litigants. "Special and important reasons" imply a reach to a problem beyond the academic or episodic.

349 U.S. at 74. In dismissing the writ, the Court wrote further:

> . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties . . .

349 U.S. at 79.

It is difficult to conceive of a question more lacking in broad public import, or one more limited in pertinence to "the benefit of the particular litigants," than the district court's hearsay rulings challenged in Sections I and II of the petition. The petitioners' hearsay claims refer to evidence from journalists that the rebels' goal was to overthrow the established Liberian government and assume control of the government. Such testimony was based upon direct conversations between the journalists and the rebel leaders, as well as statements from the rebel leaders the journalists heard at press conferences.

This testimony regarding the rebel leaders' intent, which clearly was not hearsay, raises nothing more than routine claims of trial error. *See, e.g.*, Fed. R. Evid. 803(3) (statements of a declarant's intent, plan, motive or design are not excluded by the hearsay rule). There is nothing "special" or "important" about these claims, nor does the petition itself argue that any broader import is involved.

Moreover, the petition misrepresents the record in claiming

that the district court "weighed" the evidence the petitioners erroneously characterize as hearsay. In upholding the War Risk Defense as a matter of law, the district court did not consider the weight of the testimony the petitioners claim is hearsay, as the petition contends. Rather, the district court rested its decision on the fact that the testimony was *uncontradicted*, which the district court was required to consider. *Brady v. Southern Railroad Co.*, 320 U.S. 476, 479-80 (1943) (when, without weighing credibility, there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict . . . or by judgment notwithstanding the verdict); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting *Brady*, and stating that "the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict"). The hearsay claims are thus not deserving of the Court's review.

III.

CERTIORARI SHOULD NOT BE GRANTED TO RENDER WHAT WOULD AMOUNT TO ADVISORY OPINIONS ON CLAIMS THAT ARE MOOT.

The Court does not review questions that are moot and would result only in the issuance of advisory opinions. *Montana v. Imlay*, 506 U.S. ___, 113 S. Ct. 444, 121 L. Ed. 2d 310 (1992) (certiorari petition dismissed as improvidently granted because "no matter which party might prevail in this Court," the judgment would be the same); *United States v. Richardson*, 418 U.S. 166, 171 (1974) (the Court's power may not be exercised over questions that are "moot or calling for an advisory opinion"); *Fay v. Noia*, 372 U.S. 391, 430 (1963) (the Court is obliged to "refrain from rendering advisory opinions or passing upon moot questions").

Sections IV and V raise issues connected with the bifurcated trial of the bad faith damages. Unquestionably, however, the dispositive ruling concerning the petitioners' bad faith claims was the district court's "no evidence" finding. By that ruling, the district court determined, and the Third Circuit agreed, that the petitioners had not made out the elements of their bad faith claims as a matter of law. The petitioners of course may not challenge that ruling here. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987) ("a court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"), citing *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

Nevertheless, Sections IV and V of the petition allege that the district court's bifurcated trial of bad faith damages violated Seventh Amendment jury guarantees. Such a claim is irrelevant, given the present posture of the case. Since the petitioners did not prove their bad faith claims at all, and are not entitled to recover any damages, they would not be entitled to recover such damages no matter how the Court ruled on the petition's purported Seventh Amendment claim. The petition's challenge to the way the bad faith *damages* were tried is, clearly, moot. Thus, even if a potential Seventh Amendment issue were lurking somewhere in these sections, which respondent cannot find, since a decision on such a question would not have the slightest impact on the judgment in this case, any decision by this Court would be advisory, and, therefore, impermissible. *Fay v. Noia*, 372 U.S. at 430, n. 40 ("if the same judgment" would be rendered after the lower court's ruling were "corrected," the Supreme Court's opinion "could amount to nothing more than an advisory opinion"). Certiorari, thus, should not be granted for these claims.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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